Supreme Court of the United States

October Term, 1947

No. 524

NORRIS & HIRSHBERG, INC.,
Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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REPLY BRIEF FOR PETITIONER

This reply is submitted by petitioner to demonstrate the failure of respondent's brief to meet the facts and issues in the case.

1.

In opposing certiorari, respondent suggests that petitioner's attack on the records filed with the court below has been captious and dilatory (Br. 2, 12, 16, 20-21). But petitioner has simply acted as required to protect its substantial rights. The administrative proceedings were extensive and long delayed by the Commission itself. The Commission's order revoking petitioner's license was based upon findings of fact contrary to the findings of the Trial Examiner before whom the witnesses testified in person.

The scope of review in the Court of Appeals is limited, thereby making it of prime importance that it have before it the actual record which was used by the respondent Commission in reaching its decision. It is of great importance to petitioner that it should not be required to proceed to a review of the merits upon a fatally defective record. Indeed the present issue is whether under the circumstances of this case the Court of Appeals has jurisdiction to proceed.

The court below certainly did not think that petitioner's insistence upon a proper record was captious. It considered the questions raised about the record substantial enough to justify the following actions:

(a) On February 17, 1947, the court below remanded the case to the Commission (R. 161) to proceed in conformity with its opinion of that date (R. 146-152). In that opinion the court referred to petitioner's allegation, which the Commission admitted, that the transcript contained as Commission Exhibits twelve documents which had not been received in evidence but which were attached after the record before the Trial Examiner had been closed. The court then said: "This criticism is a serious one" (R. 149, 156).

(b) The court below refused to accept a new certification tendered by the Commission on March 11, 1947, although in the language of the statute (R. 185-187).

(c) In response to petitioner's criticism of that part of the court's opinion of February 17th relating to the summary or digest of evidence used by the Commission (R. 151-152), the court on June 5, 1947 amended its opinion in so far as it dealt with that subject (R. 158-160).

(d) On July 16, 1947, the court denied the Commission's motion for stay of execution and for leave to file an amended certification of transcript, dated June 20th (R. 193), although such certification was in the language of the statute and admittedly identified the correct record status of all material in the filed transcript (R. 185-187).

The action taken by the court below on November 19, 1947, accepting the re-filed transcript with the certification of September 23, 1947 (R. 194-197, 198) involved a change of position by that court. The importance of the issue remains in the case. It can be set at rest only by affirmative action of this Court.

2.

Respondent's brief in opposition many times misstates the central issue of law in this case.[1] The question is not whether the *present* certified transcript "fully reflects the evidence offered and received in the administrative proceeding" (Resp. Br., pp. 12-13). The question is whether, under the circumstances of record here, the respondent Commission even had the proper record before it *when it decided the case.* There is no question of identifying that evidence which was properly offered and received in the administrative proceedings, as respondent would suggest (Id. at p. 2). Instead, the issue here is whether, in deciding the case, the Commission utilized a record which contained only that evidence and all of that evidence.

It is apparent from the admitted facts that the record before the Commission at the time of decision was misleading and defective. For one thing, it contained spurious exhibits which had the appearance of evidence (R. 221-254). Other defects are described in the petition. Where the record before the Commission at the time of decision was thus defective and misleading there is no basis for *assuming* that the record did not mislead the Commission.

[1] The question is not, as respondent would prefer to have it, the propriety of "interrogation as to the *manner* in which the members of the Commission utilized the record in arriving at their decision" (Resp. Br., p. 2), or determination of what constitutes a "proper consideration of the record" (Id. at p. 6) or an "inquisition" into that subject (Id. at p. 7), or "*how* the various items . . . were treated by the Commission in its decisional process" (Id. at p. 11), or "a time-consuming inquiry into the intellectual processes of the individual deciding Commissioners" (Id. at p. 13). *(Italics added)*

Although, in the absence of some such circumstance, a presumption might be indulged that the predecessor Commissioners "conscientiously discharged their decisional process" (Resp. Br., p. 20), such presumption can not prevail where the Commissioners had before them a record so obviously defective that it would be unlikely not to mislead. Even if it be assumed that the Commissioners' consciences were clear, the question is whether they acted upon an admittedly defective record—a question of fact. Under the circumstances of this case is petitioner entitled to have this fact determined? That is the issue here.

Respondent says (Resp. Br., p. 20) that "it is not clear that any certification by present Commissioners could satisfy petitioner." By this statement respondent attempts to pose an issue *not* presented in this case, namely whether as a general proposition successor Commissioners can ever certify as to the actual record used by their predecessors. But petitioner merely contends that *under the circumstances of this case* the present Commissioners are not in a position to furnish a certification as to the actual record used by their predecessors in reaching their decision. Here the respondent has made it clear that its certification must rest upon a bare presumption, and while generally such a presumption might be sufficient, it is rebutted here by admitted facts which constitute substantial evidence tending to prove the contrary. None of the authorities cited in respondent's brief suggests that a reviewing court must accept an agency's certification as conclusive as to the identity of the record used for decision, much less so under circumstances such as are presented here.

3.

Respondent seeks to minimize the importance of the spurious exhibits which its prosecuting staff inserted in the files of evidence after the record was closed and before submission of the case to the Trial Examiner. Although respondent admitted in its "Opinion on Remand" that

it had been "improper" to attach such material to the evidence (R. 168), it sought to argue there (R. 166-168) as it does here (Resp. Br., pp. 14-15) that the error was cured by a ruling of the Presiding Commissioner at the oral argument (R. 257-259). But, on the contrary, that ruling actually increased the confusion.

Petitioner had called attention to the presence of such extraneous material in the evidentiary files and had moved to have it taken out of the record (R. 257). The Presiding Commissioner ruled that "those things will be removed" and "they will go in their proper place as part of the argument rather than as part of the record" (R. 259). Respondent now argues that, notwithstanding this ruling, the Commission merely "followed a common practice" in allowing the material to remain, together with the Commission's ruling (Resp. Br., p. 15). This argument might be persuasive *if* the ruling had simply been that the material in question was not evidence (which was not the issue), *if* the material had been specifically identified at the time of the ruling (which it was not), and *if* the material had been clearly marked as "not evidence" (which was not done). But the ruling was that the material "will be removed". Consequently, anyone thereafter consulting the record during the seventeen months during which the case was under consideration by the Commission would naturally assume that the record had been purged of all spurious exhibits in accordance with the ruling. Anyone would then naturally assume that what remained was genuine evidence.

Moreover, the argument made by respondent in its brief (p. 15) to the effect that in allowing the extraneous material to remain in the evidentiary files the Commission merely followed a common practice is nullified by the fact that the Commissioners' ruling that "those things will be removed" and "they will go in their proper place as part of the argument rather than as part of the record" (R. 259) was partly carried out. ***Some but not all of the extra-***

neous material was removed from the evidentiary files. This fact is apparent from an examination of the respondent's brief (p. 14) in the light of the record.[2] This circumstance makes even more misleading the record before the Commission during the seventeen months that elapsed between oral argument and the decision by the Commission.

4.

Respondent misses the point as to the summary or digest of evidence prepared for the Commission's use by its Opinion Writing Office. Petitioner did not contend that the use of such a summary by the Commission was fatal to the proceeding if it were used "only as an aid in considering the actual evidence" (R. 160). Petitioner's allegation was that the summary was used by the Commission "in lieu of the reporter's transcript of testimony" and

[2] In Respondent's Requested Finding No. 162 (R. 255) the respondent stated that the "Commission's Exhibits 10 and 61-72 inclusive have attached thereto complete explanations of the contents thereof" and that "copies of the aforesaid explanations are attached hereto and marked 'Schedule B' for identification". Respondent's brief (p. 14) admits the same thing—that the material attached to the Staff's Requested Finding No. 162 as Schedule B was identical with the material which was later found to have been improperly placed in the evidentiary files. Yet, a comparison of said Schedule B with the extraneous material physically found in the evidentiary files in the record originally filed in the Court of Appeals will show that some of the material in Schedule B was not to be found with the extraneous material in the evidentiary files. For example, the explanatory material headed "Commission's Exhibit No. 64" was not included in the evidentiary files of the transcript filed with the Court of Appeals, but two sets of that material were included in said Schedule B (R. 255, 221-254). It seems clear that some of the material improperly placed in the evidentiary files was later and secretly removed (See Note under Schedule B at R. 255). This fact demonstrates the complete confusion in the minds of the Commission as to exactly what did happen, especially when compared with the Commission's assertion in its "Opinion on Remand" that it had subsequently (and secretly) overruled the Presiding Commissioner and decided "not to cause the physical removal" of the questioned material (R. 166).

that "this summary or digest, rather than the transcript of testimony, constitutes the 'evidence' upon which the Commission overruled its Examiner and issued its order" (R. 132). Respondent refused to affirm or deny these allegations of fact (R. 138).

The court below said that the validity of petitioner's objection "depends upon the nature of the summary and the use to which it was put by the Commission" (R. 158). Respondent gave no assurance to the court below, and gives no assurance to this Court, that the summary was not used by the Commission *in lieu of* the reporter's transcript. Respondent's brief fails to meet the issue with respect to the summary (Resp. Br., pp. 17-19). This Court is therefore presented with the question whether an agency may rely on a summary of evidence prepared by subordinates, not merely as an aid in its consideration of the actual evidence but in lieu of the reporter's transcript, as a basis for overruling its Trial Examiner and making findings of fact upon which it revokes a license.

Respondent suggests that petitioner's belief as to the accuracy and prejudicial nature of the summary is based upon mere surmise (Resp. Br., pp. 18-19). But petitioner had alleged, and respondent failed to deny, that the Commission "refused to produce such summary or digest for use as a basis for an agreed summary of testimony to be included in a printed joint appendix" for the court below "except on condition that the petitioner agree to use it for no other purpose" (R. 132). Certainly if the staff summary were good enough for the Commission to consider in lieu of the evidence, it should have been good enough for the Court of Appeals to have used. And, even if it could be asserted that an administrative body could properly consider a summary of evidence instead of referring to the actual record to resolve disputes of fact, certainly this authority to substitute should be safeguarded by permitting all interested parties to see the summary which is used to replace the record. But respondent

stoutly refused to let petitioner examine this summary unless petitioner would agree that it would make no objection to the action taken by the Commission on the ground that the summary, through omission or inclusion, was unfair to petitioner. That is to say, before letting petitioner examine the summary, respondent would have required petitioner to waive any rights it might be found to have to complain of the Commission's action on the ground that the summary were prejudicial. If the summary were not prejudicial, how can one account for the eagerness of the Commission to extract, as a price for seeing it, that the petitioner waive what might prove to be substantial rights? The belief that the summary was prejudicial is strengthened by the fact that the Commission would neither admit nor deny that it was prejudicial, and also by the fact that the Commission reversed the Trial Examiner on the facts although the Trial Examiner had heard all of the evidence in person.

CONCLUSION

It is submitted that the several questions raised by the petition are of great importance and that this Court should settle the applicable principles in the interest of affording proper guidance to government agencies, assuring protection to the private parties who are regulated by them, and strengthening public confidence in the administrative process. Otherwise this case must stand as holding that, although evidence may be omitted, spurious exhibits included, and a secret summary substituted for the actual record before an administrative body, a person aggrieved by this unfair procedure is without any remedy.

Respectfully submitted,

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